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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1149

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

JARIUS PIPHUS, A MINOR, AND GENEVA PIPHUS,
GUARDIAN AD LITEM FOR JARIUS PIPHUS,*Respondents.*

JOHN D. CAREY, ET AL.,*Petitioners,*

vs.

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO,
A MINOR, AND CATHERINE BRISCO, GUARDIAN AD LITEM
FOR SILAS BRISCO,*Respondents.*

**RESPONDENTS' BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

DAVID GOLDBERGER,
ROGER BALDWIN FOUNDATION
OF ACLU, INC.,
5 South Wabash Avenue,
Suite 1516,
Chicago, Illinois 60603,
Tel: (312) 726-6180,JOHN ELSON,
NORTHWESTERN LEGAL
ASSISTANCE CLINIC,
360 East Superior Street,
Chicago, Illinois 60611,
Tel: (312) 649-8576,*Attorneys for Respondents.*

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents pray that the requested Writ of Certiorari not issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 22, 1976.

OPINIONS BELOW.

The opinion of the Court of Appeals reversing the decision of the District Court is officially reported at 545 F. 2d 30 and is reproduced in Appendix A to the Petition at page A1. The memorandum opinion of the District Court was not reported. It is reproduced in Appendix A to the Petition at page A5.

JURISDICTION.

The Petition for Writ of Certiorari adequately sets forth the jurisdictional requisites.

QUESTION PRESENTED.

Whether the holding of the Court of Appeals conflicts with the holdings of other circuit courts of appeals as to the appropriate measure of damages in cases of bad faith violations of constitutional rights and thereby raises a question of substantial importance to be resolved by the United States Supreme Court?

REASONS FOR REFUSING THE WRIT.

The Petition should be denied because the Seventh Circuit's holding as to the appropriate measure of damages for constitutional rights violations does not conflict with the holdings of the other circuits. The alleged "widespread disagreement" (Petitioners' Brief for Certiorari at 13) among the Circuits on this issue is a result of Petitioners' misstating the holdings of the cases they cite.

The cases Petitioners cite for the proposition that only nominal or no damages may be recovered for violations of constitutional rights absent proof of actual consequential losses either state the contrary to that or do not address the issue at all. Thus, in *Magnett v. Pelletier*, 488 F. 2d 33 (1st Cir. 1973), Petitioners' Brief for Certiorari at 9, the First Circuit did reverse the district court's award of \$500 nominal damages

because such damages are a mere token, but in so doing also recognized that more than nominal damages can be awarded for the loss of civil rights in themselves:

"This is not to say that in a civil rights action a plaintiff who proves *only an intangible loss of civil rights* or purely mental suffering may not be awarded *substantial compensatory damages*." 488 F. 2d at 35. (Emphasis added.)

In *Manfredonia v. Barey*, 401 F. Supp. 762 (E. D. N. Y. 1975), Petitioners' Brief for Certiorari at 12, the court, as Petitioners point out, affirmed its own discretion to determine the amount of damages to be awarded. However, Petitioners fail to mention that it also recognized that no evidence other than the violation of constitutional rights is needed to justify substantial compensatory damages:

"Neither plaintiff in this action has claimed any resulting out-of-pocket loss, diminution of earnings or physical injury of such consequences as to warrant the greatly increased compensation they demand. Such familiar elements of damage, however, need not be shown in order to justify a reasonably substantial compensatory award in a civil rights case. [cite omitted] It is sufficient to establish, as plaintiffs have succeeded in doing here, a deprivation of constitutional rights through misuse of official power." 401 F. Supp. at 770.

The cases Petitioners cite which deny compensatory damages for civil rights violations also do not contradict the Seventh Circuit's holding because they concern only the insufficiency of the evidence offered to establish the actual consequential damages that were claimed and do not reach the issue of whether plaintiffs could also rightfully claim general damages for the constitutional violation alone. Thus, in *Fort v. White*, 530 F. 2d 1113, 1116 (2nd Cir. 1976), Petitioners' Brief for Certiorari at 10, plaintiffs did not claim general compensatory damages in their complaint, and explicitly waived such damages at trial. Similarly, in *Stolberg v. Members of Bd. of Tr. for State Col. of Conn.*, 474 F. 2d 485, 488-9 (2nd Cir. 1973), Petitioners' Brief for

Certiorari at 11, the court denied an award of actual compensatory damages for injury to reputation and for humiliation to an unconstitutionally dismissed college professor, who was subsequently elected to the state legislature, because there was no evidence to establish that he suffered the claimed injuries. Petitioners' reliance on the "strong language" in *Cordeco Dev. Corp. v. Vasquez*, 539 F. 2d 256, 261-2 (1st Cir. 1976), Petitioners' Brief for Certiorari at 9-10, illustrates their confusion in trying to equate, on the one hand, findings of insufficient proof to establish claimed consequential injuries from constitutional rights violations with, on the other hand, holdings that constitutional violations cannot in themselves constitute compensable injuries. In *Cordeco* the court refused to award damages for lost profits from the unconstitutional denial of a mining license because plaintiffs did not present proof to establish that they actually suffered lost profits as a result of the constitutional violation. Similarly, in *Smith v. Losee*, 485 F. 2d 334, 344-5 (10th Cir. 1973), Petitioners' Brief for Certiorari at 8-9, the issue addressed by the court was not whether damages could be awarded because of the nature of the constitutional violation itself, but rather, whether the record contained adequate facts to support an award of damages for specific claimed injuries attendant upon the constitutional violation, *i.e.* plaintiff's inability to find a teaching position and his harassment by the defendants.

The nominal damage cases Petitioners cite are also irrelevant to the holding of the Seventh Circuit below. These cases properly recognize that even if the plaintiff does not establish a specific monetary value to compensate him for the loss of his constitutional rights he has an automatic right to *at least* nominal damages. None of the cases cited by Petitioners state, or imply, that upon an adequate showing of the nature and value of the constitutional right of which he was deprived, plaintiff cannot recover more than nominal damages. Thus, in *Basista v. Weir*, 340 F. 2d 74 (3rd Cir. 1965), Petitioners' Brief for Certiorari

at 11, the Third Circuit presumed nominal damages from the deprivation of plaintiff's constitutional rights in order to sustain the jury's award of \$1,500 punitive damages. 340 F. 2d at 87. The court did not state that proof of the deprivation of a constitutional right entitles plaintiff to no more than nominal damages. That such was not its intent is clear from its explicit reliance on Justice Holmes' opinion in *Nixon v. Herndon*, 273 U. S. 536 (1927). The Court held in that case that a private damage action for \$5,000 could be maintained for deprivation of the right to vote even though, as the court in *Basista* noted, "it does not appear that the wrong effected any damage in dollars or cents for the plaintiff." *Basista*, 340 F. 2d at 88. The cases authorizing general damages for voting rights violations provided the *Basista* court with a "useful and persuasive analogy" to the action before it for deprivation of personal liberty. 340 F. 2d at 88. See *Wiley v. Sinkler*, 179 U. S. 58, 65 (1900); see also *Wayne v. Venable*, 260 F. 64, 66 (8th Cir. 1919) ("In the eyes of the law this right [constitutional right to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing. . .").

Petitioners similarly misstate the Third Circuit's holding in *Paton v. LaPrade*, 524 F. 2d 862 (1975), Petitioners' Brief for Certiorari at 11, which did not, as Petitioners contend, require proof of individualized injury to support an award of more than nominal damages. Rather, it reversed the district court's grant of defendants' summary judgment motion denying any damages because of the possibility that after trial plaintiffs could recover out-of-pocket expenses. 524 F. 2d at 871-872. Petitioners' citation on the nominal damages question of *Tyrrell v. Speaker*, 535 F. 2d 823, 829-30 (3rd Cir. 1976), Petitioners' Brief for Certiorari at 11, *Schiff v. Williams*, 519 F. 2d 257, 261 (5th Cir. 1975), Petitioners' Brief for Certiorari at 11, *Sexton v. Gibbs*, 446 F. 2d 904 (5th Cir. 1971), *cert. denied* 404 U. S. 1062 (1972), Petitioners' Brief for Certiorari at 11, *Bell v. Gayle*,

384 F. Supp. 1022, 1026 (N. D. Tex. 1974), Petitioners' Brief for Certiorari at 12, and *Washington v. Official Court Stenographer*, 251 F. Supp. 945, 947 (E. D. Pa. 1966), Petitioners' Brief for Certiorari at 12, are similarly misleading since none of these cases specify that only nominal damages, and not general compensatory damages, may be awarded for constitutional violations which are not supported by proof of actual individualized injury.

Petitioners also cite many cases which have no relevance to the issues decided by the Court of Appeals below since they deny damages because of the defendant officials' defense of good faith: *Ault v. Holmes*, 369 F. Supp. 288, 293 (W. D. Ky. 1973), Petitioners' Brief for Certiorari at 12 (damages denied in prison transfer case because "the question of the unconstitutionality of such transfers was very much in doubt."); *Jones v. Superintendent*, 370 F. Supp. 488, 493 (W. D. Va. 1974), Petitioners' Brief for Certiorari at 13 (vegetarian prisoner not provided with adequate meatless diet while in solitary confinement could not get damages where defendant acted in good faith upon physician's advice); *Callahan v. Sanders*, 339 F. Supp. 814, 819 (M. D. Ala. 1971), Petitioners' Brief for Certiorari at 12 (justices of the peace who heard traffic cases not properly before them were not liable for damages as they were reasonably confused as to their exact jurisdiction); *Cordova v. Chonko*, 315 F. Supp. 953, 964 (N. D. Ohio 1970), Petitioners' Brief for Certiorari at 12 (nominal damages where defendant high school principal made a reasonable mistake in believing he could suspend long-haired student without a prior hearing). As the District Court in the instant case found that Petitioners had acted in bad faith, Petitioners' Brief for Certiorari at A14, these cases are inapposite.

Finally, three cases cited by Petitioners because they deny damages for civil rights violations were decided on the basis of affirmative matter wholly unrelated to a lack of proof of general damages: *Knuckles v. Prasse*, 435 F. 2d 1255, 1257 (3rd

Cir. 1970), Petitioners' Brief for Certiorari at 11 (denial of damages upheld because district court acted within its discretion in joining legal and equitable counts and treating both as equitable); *Tracy v. Robbins*, 40 F. R. D. 108, 113 (D. S. C. 1966), Petitioners' Brief for Certiorari at 10 (class suit for damages dismissed because damages were several and distinct for each class member); *International Prisoners' Union v. Rizzo*, 356 F. Supp. 806, 810 (E. D. Pa. 1973), Petitioners' Brief for Certiorari at 12 (suit for damages dismissed because plaintiffs, as members of a class for which prior successful action for injunctive and declaratory relief had been brought, were bound by prior case and could not bring a new action).

Thus, only by misreading the holdings of cases do Petitioners create a semblance of conflict among the circuit and district courts. Furthermore, any complaints Petitioners have about the unfair or disproportionate nature of the award of damages in this case should await the District Court's determination on remand of what those damages actually are.

Finally, Petitioners do not challenge on legal or policy grounds the correctness of the Seventh Circuit's holding. It should be noted in this regard that a holding contrary to that of the Seventh Circuit would give school authorities the freedom to ignore the requirements of procedural due process whenever they believed they could justify their suspensions or expulsions in a subsequent hearing which a court may order. The Seventh Circuit held below, Petitioners' Brief for Certiorari at A4, that if the suspension of plaintiffs would have been imposed had there been no due process violation, plaintiffs cannot recover consequential damages. Although it has been unsuccessfully argued to this Court that the Seventh Circuit's position on this question of consequential damages from civil rights violations unduly weakens the protection from official invasion which 42 U. S. C. Sec. 1983 was intended to give constitutional rights (see Petitioners' Brief for Certiorari, *Hostrop v. Board of Junior College District No. 515*, 425 U. S. 963 (1976), denying cert. to 523

F. 2d 569 (7th Cir. 1975)), there can be no dispute that if Petitioners' argument against awarding general damages solely for bad faith deprivations of constitutional rights is also recognized by this Court, then school officials would enjoy total immunity for their violations of procedural due process whenever they can come up with *ex post facto* justifications for their disciplinary measures, regardless of how unjustified their original denials of due process had been.

CONCLUSION.

For the foregoing reasons the Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied or, if granted, the Opinion of the Court of Appeals on the issues presented herein should be summarily affirmed.

Respectfully submitted,

DAVID GOLDBERGER,
ROGER BALDWIN FOUNDATION
OF ACLU, INC.,
5 South Wabash Avenue,
Suite 1516,
Chicago, Illinois 60603,
Tel: (312) 726-6180,

JOHN ELSON,
NORTHWESTERN LEGAL
ASSISTANCE CLINIC,
360 East Superior Street,
Chicago, Illinois 60611,
Tel: (312) 649-8576,

Attorneys for Respondents.

(ROBERT S. HORWITZ, a Northwestern University Law School student assisted in the preparation of this brief.)